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No. 271234, consolidated with
271242, 271251, 271269, 271277

COURT OF APPEALS DIVISION III
STATE OF WASHINGTON

KITTITAS COUNTY, a political subdivision of the State of Washington, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS (CWHBA), MITCHELL WILLIAMS, d/b/a/ MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU, and SON VIDA II,

Appellants,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

KITTITAS COUNTY FARM BUREAU'S BRIEF

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I. INTRODUCTION

The Kittitas County Farm Bureau ("Farm Bureau"), in reply to the Brief of Kittitas County Conservation, Ridge and Futurewise (collectively referred to as "Futurewise") joins in and incorporates the reply arguments made by Kittitas County. In addition, the Farm Bureau takes this opportunity to reply, on its own, to two issues. One, the Eastern Washington Growth Management Hearings Board's ("Board") improper foray into water regulation and management. (AR, p. 1218-1223). Two, the use of Kittitas County's innovative "one-time split" ordinance to preserve farm land.

II. DISCUSSION

A. Water.

The Farm Bureau is extremely concerned with the Board's patent attempt to interpose itself into water rights and water management. (AR, p. 1218-1223). The issue the Board inserts itself into relates to wells that are exempt from permitting under RCW 90.44.050. Under the law, exempt wells may be used for residential and group domestic supply in addition to other uses. RCW 90.44.050. One of the other uses wells that are exempt from permitting may be used for is for the unlimited withdrawal of water for stock watering purposes. (AGO 2005, No. 17).

The use of water for stock watering and irrigation is vital to Kittitas County's agricultural community. The Farm Bureau's position is neither Kittitas County nor the Board has jurisdiction over water issues. Particularly, the Board has no jurisdiction over water issues under RCW 36.70A.020(10) and RCW 36.70A.070(5)(C)(iv), the two statutes the Board relied on in the FDO. (AR, p. 1221). As a result, the Board cannot find county ordinances do not meet GMA criteria because they ordinances do not regulate water use. Similarly, the Board cannot order the county to adopt ordinances which do regulate water.

The Farm Bureau members are engaged in various agricultural activities, not just farming as Futurewise asserts, virtually all of these agricultural activities require some level of irrigation or involve the management of water and land together to produce agricultural commodities. As such, those members are extremely sensitive to regulation of water. Virtually all of the surface water in Kittitas County is currently under the jurisdiction of the Yakima County Superior Court in *Acquavella vs. Ecology*, Cause No. 77-2-01484-5.[1]

The Farm Bureau's position is the Board's justification for its jurisdiction is flawed. RCW 36.70A.020 is a statement of planning goals. Specifically, RCW 36.70A.020(10) indicates that a planning goal is to "protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water". A statute which expresses a planning goal does not confer jurisdiction on an administrative body. Similarly, RCW 36.70A.070 mandates what each comprehensive plan must include. RCW 36.70A.070(5)(C)(iv) indicates that the rural element of a comprehensive plan must contain means to protect critical areas, surface water and ground water resources. Again, the statute does not confer jurisdiction upon the Board in a challenge to a development regulation (as opposed to a comprehensive plan) to regulate water. The Board's assumption of jurisdiction over water regulations in this case ignored RCW 36.70A.280 which specifically established and by inference, limited, the Board's authority to determine whether, in this case, the County's development regulations comply with the GMA. RCW 36.70A.280(a).[2]

The Department of Ecology has the exclusive jurisdiction and the responsibility to adopt, implement and administer laws which regulate the use of surface and ground water in this state. RCW 43.21A.064. Kittitas County,

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[1] *Ecology vs. Acquavella* is a general water rights adjudication commenced in 1977 under Chapter 90.03 RCW. The case has not been concluded yet, despite its 32-year length. Various aspects of the case have been before the Court of Appeals and, on at least three occasions, the case has gone to the Washington Supreme Court.

[2] See also BIAW Opening Brief at pages 28-29 and Kittitas County's Opening Brief, pages 26-34.

had it wanted to, could not adopt development regulations which regulate a landowner's use of water. That is the sole province of the Department of Ecology through its director. RCW 43.21A.064(1), (2), (3).

Candidly and bluntly put, the agricultural community in Kittitas County has enough trouble dealing with Ecology and the *Acquavella* court's control over water rights. The Board, asserting it has the ability to direct Kittitas County to adopt regulations which control or regulate the use and management of water, further compounds the difficulties water management creates in the agricultural community. The court should not accept Futurewise's offer to further compound the strain on the agricultural community by sanctioning authority over water resources by the Board, let alone the County.

B. Kittitas County's "One-Time Split" Procedure.

The one-time split procedure in Kittitas County, contrary to Futurewise's assertions, exists to preserve and protect agricultural land in Kittitas County. The Farm Bureau addressed this issue in its Reply Brief in the companion case, Court of Appeals Cause No. 265471 (the "Comprehensive Plan Appeal). The Comprehensive Plan Appeal is a case involving similar challenges to Kittitas County's Comprehensive Plan. This case and the Comprehensive Plan Appeal are linked. The Farm Bureau, to avoid duplicative briefing, incorporates its arguments made in the Comprehensive Plan Appeal into this Brief.

The "one-time split" procedure is designed to allow smaller parcels to avoid rural sprawl. Kittitas County's concerns with rural sprawl were discussed and recognized by this court in *Henderson vs. Kittitas County*, 142 Wn. 2d. 747, 100 P. 3d. 842 (2004). Futurewise argues the one-time split procedure allows "property owners to divide the properties below density levels approved by GMA". (Futurewise Reply Brief, page 34). GMA does not "approve" densities. GMA allows counties to set densities based upon local circumstances, including the desire to avoid the rural sprawl that plagued Kittitas County prior to its adoption of a comprehensive plan and

developmental regulations that allowed smaller densities, some of which were the result of the one-time split. Futurewise, with no authority, opines that 20-acre parcels are the absolute minimum for commercial agriculture. (Futurewise Reply, page 35).

First, the court should keep in mind that in Kittitas County there are agricultural activities conducted on significant portions of the land which is designated as rural under the comprehensive plan and there are agricultural activities conducted on that portion of the county that is designated as commercial agricultural land of long-term significance. Futurewise, in this case argues there were 120 farms in Kittitas County between 1 and 9 acres in size with the average of those 120 farms being 5.68 acres. (Futurewise Reply, page 11). If 120 farms in Kittitas County are between 1 and 9 acres in size, it is clear 20 acres is not the absolute minimum size for a farm. To the contrary, these statistics demonstrate that there is no such thing as a minimum or a maximum for a viable farm.

Futurewise's contention that *Lewis County vs. Western Washington Growth Management Hearings Board*, 157 Wn. 2d. 488 (2006) is dispositive of this issue is not correct. The *Lewis County* case does not prohibit Kittitas County's one-time split. The *Lewis County* case dealt with the designation of commercial agricultural land of long-term significance. The case has no applicability to those lands within Kittitas County that are designated as rural and on which agricultural activities are conducted. In *Lewis*, what the court did was recognize and sanction a county's "ability to use innovative zoning techniques" to conserve the agricultural lands and encourage the agricultural economy. *Id at 507-508.*

Kittitas County's one-time split does not allow residential subdivision. As argued in the Farm Bureau's Reply Brief in the Comprehensive Plan Appeal, the one-time split provision provides agricultural producers and large land owners the flexibility to manage their land, which is their largest capital asset, to ensure they can survive drought and uncertain economic times.

III. CONCLUSION

For these reasons, the Court of Appeals should reverse the Board's decision which invalidated Kittitas County's one-time split and which ruled that KCC 16.04 violated the Growth Management Act.

RESPECTFULLY SUBMITTED this 25 day of June, 2009.

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Attorney for Kittitas Co. Farm Bureau

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